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June 7, 2012

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, Maryland 20743

Re: CC Docket No. 02-6; Request for Review

Dear Madam Secretary,

Please find enclosed the Request for Review filed by undersigned counsel on behalf of Responsive Services International, Inc. with respect to the appeal of a USAC decision dated 5.10.12 for Funding Year 2005-2006; Funding Request No. 1316125.

Thank you for your attention.

Respectfully,

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
CC DOCKET NO. 02-6**

REQUEST FOR REVIEW

**In re Responsive Services International, Inc.; Appeal of USAC decision dated
5.10.12 for Funding Year 2005 - 2006; Funding Request Number 1316125.**

COMES NOW, Responsive Services International, Inc., by and through undersigned
counsel, and files this Appeal of the USAC decision dated 5.10.12 for Funding Year 2005;
Funding Request Number 1316125 (the “USAC Decision”) as follows:

1. On 5.10.12, the USAC Decision was issued denying the appeal of Responsive Services International, Inc. (“RSI”) with regard to the USAC Funding Year Commitment Adjustment Letter (the “Adjustment Letter”) for funding request number 1316125.
2. The USAC Decision predicated its denial on RSI and the Olton Independent School District’s (“OISD”) alleged violation of competitive bidding requirements “which represents the conflict of interests and compromises the competitive bidding process...”.
Id.
3. As detailed below, the USAC Decision must be reversed because it is factually incorrect and misapplies the very law it cites in support of the denial determination. Moreover, RSI did not engage in any knowing or willful conduct which allegedly violated USAC/FCC statutes and/or regulations and/or rules.

I. **RSI was Not Involved in Determining the Services sought by the Applicant and the Selection of the Service Provider.**

4. In its Adjustment Letter, USAC made the following factual determination:

“After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During the course of review it was determined that one employee, Stephen Miller, of Responsive Services International, Inc. was on the Technology Planning Committee for Olton Independent Schools Districts technology plan. Therefore, Responsive Services International Inc. was involved in determining the services sought by the applicant and the selection of the applicant’s service providers is associated with a service provider that was selected.” *Id.*

5. Admittedly, Mr. Miller’s position as a member of the technology planning committee has raised concerns as expressed by USAC. However, his attendance of any such meetings did not compromise the competitive bidding process or constitute conflict of interest. Critically, no inside information was obtained by Mr. Miller on behalf of RSI which resulted in any unfair advantage. Additionally, the OISD made its own determination as to the services sought by the applicant.
6. Moreover, even if the Commission were to determine that it was incorrect for Mr. Miller to serve on the technology planning committee, such was a “harmless error” at worst. Given the complexity of the underlying program rules, it is certainly not unusual for a service provider, such as RSI to make a technical mistake as aforesaid in the implementation process. In fact, the FCC in its decision, *In the Matter of Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., and School and Libraries Universal Service Support Mechanism, adopted 7.23.04; FCC 04-181*, recognized that service providers in many situations may be totally unaware of the program violation as their principal focus is to

provide the “supported service” to the applicant. As the FCC stated:

“To be sure, service providers have various obligations under the statute and our rules as well. Among other things, the service provider is the entity that provides the supported service, and as such, must provide the services provided for funding within the relevant funding year. The service provider is required under our rules to provide beneficiaries a choice of payment method, and, when the beneficiary has made full payment of services, to remit discount amounts to the beneficiary within twenty days of receipt of the reimbursement check. **But in many situations, the service provider simply is not in a position to ensure that all applicable statutory and regulatory requirement have been met. Indeed, in many instances, a service provider may be totally unaware of any violation.**” *Id.* at paragraph 12, p.5. (Emphasis Added.)

7. The reflexive determination of program violation does not support the aforesaid FCC objectives in such situations where as in the instant case (1) the service provider was unaware of the requirement(s) and (2) most importantly, the service provider ***not engage in any conduct whatsoever which constituted a violation of applicable statutory or regulatory requirements.*** Accordingly, the USAC Decision must be reversed.
8. Mr. Miller and RSI were NOT the recipients of “inside information that resulted in an unfair advantage” as set erroneously set forth in the Adjustment Letter.

As corroborated by RSI’s Letter of Appeal, the alleged conduct **never occurred.**

“Further, RSI did not receive ‘inside information’ that resulted in an unfair advantage. RSI did not have a relationship with the applicant prior to the competitive bidding that would have unfairly influenced the outcome of the competition or would have furnished RSI ‘inside information’ or allow it to unfairly compete in any way. Accordingly, RSI did not engage in an improper relationship with the applicant which in any way constituted a conflict of interest or compromise of the competitive bidding process.” *Id.*

See also, Affidavit of Stephen Miller.

9. With all due respect, USAC got it facts wrong in this matter. RSI did not engage in any improper conduct which constitutes a “conflict of interest” and must not be punished in the absence of clear evidence to the contrary.

II. Legal Authority Cited by USAC is Inapposite.

10. In the USAC Decision, the determination of violation is based upon a total misapplication of the decision, *In the Matter of Request for Review of Decisions of the Universal Service Administrator by Mastermind Internet Services, Inc.*; CC Docket No. 96-45; FCC 00-167 (Adopted 5.1.2000) (“*Mastermind*”). USAC correctly recounts the facts in *Mastermind* where “the FCC upheld SLD’s decision to deny funding where a Mastermind employee was listed as the contact person on the FCC form 470, and Mastermind participated in the competitive bidding process initiated by the FCC form 470.” *Id.* USAC further concluded that in *Mastermind*, “The FCC reasoned that under those circumstances, the Forms 470 were defective and violated the Commission’s competitive bidding requirements, and that in the absence of valid forms 470, the funding requests were properly denied. Pursuant to FCC guidance, this principle applies to any service provider contact information on FCC form 470 including address, telephone, fax numbers, and e-mail addresses.” *Id.*
11. In *Mastermind*, the FCC reviewed three requests for appeal of USAC decisions. In holding that Mastermind Internet Services, Inc. violated the competitive bidding requirements imposed by law, the FCC focused on the fact that a Mastermind employee was listed as the “contact person” with respect to the Form 470. As the FCC stated in its decision,

“Here, the Applicants named a Mastermind employee as the contact person on their Form 470, and in at least some instances, the Applicants permitted Mastermind to prepare and distribute RFP’s to potential bidders. In so doing, the Applicants surrendered control of the bidding process to an employee of Mastermind, a service provider that not only participated in the bidding process, but was also awarded the service contracts. The contact person exerts great influence over an applicant’s competitive bidding process by controlling the dissemination of information regarding the services requested. We believe, that when an applicant delegates this power to an entity that also will participate in the bidding process as a prospective service provider, the applicant irreparably impairs its ability to hold a fair and open competitive bidding process.”

Id.

Importantly, in those instances wherein the 470 form did not list Mastermind as the contact person, the **FCC did not find a violation**. “To the extent that the applications at issue here were denied by SLD (Schools and Libraries Division) in instances that the Applicant did not name a Mastermind employee as the contact person and a Mastermind Employee did not sign the associated Forms 470 and 471, we do not believe that there was a violation of the competitive bidding process.” *Id.*

12. As set forth in the Form 470 submitted to USAC by the OISD, **RSI was not listed as the contact person**. The truth of the matter is that an OISD employee was properly listed as the “contact person”.
13. Accordingly, as RSI or its employee was NOT listed as the “contact person” on the Form 470 and proscribed in *Mastermind*, its use and reliance by USAC in the USAC Decision is erroneous as a matter of law. Moreover, *Mastermind* unequivocally holds that in instances where a Mastermind employee was not named as a “contact person”, “**we do not believe there was a violation of the competitive bidding process.**” *Id.* (Emphasis added). Obviously, RSI was not named as the contact person and may NOT be held to have violated competitive bidding requirements as erroneously concluded by USAC. This determination must be reversed as a matter of law.

III. The Alleged Violations Were Not Willful.

14. The requirement that violations must be “willful” or “repeated” is set forth in 47 U.S.C.

Section 503(b). This law applies to all penalties and forfeitures imposed by the FCC.

This statute was recently interpreted in the FCC decision, *In the Matter of San Jose Navigation, Inc.*, FCC 07-3 (Adopted 1.11.07) where the FCC denied an appeal based on the applicant's assertion that it did not intend to violate the subject regulation and that its conduct was not willful. The FCC held that "The term willful is defined as 'conscious and deliberate commission or omission of any act, irrespective of any intent to violate the law'. *Id.* Accordingly, the FCC (and courts) would merely determine whether the applicant specifically intended to take the contemplated action. In *San Jose Navigation*, the applicant sold wireless navigational devices in commerce and thus violated the act willfully because it *completed the physical act of concluding sales*.

15. As discussed aforesaid, the facts alleged and relied upon in the Adjustment Letter and USAC Decision **do not constitute physical acts undertaken and completed by RSI which violated applicable law**. In fact, the applicable law, to wit, *Mastermind*, concludes precisely the opposite.

16. In that RSI's alleged action were NOT willful, there is no legal basis pursuant to 47 U.S.C. Section 503(b) to impose a “forfeiture” in this situation. Accordingly, there is no legal basis whatsoever to require that RSI refund the original funding commitment to USAC.

IV. The FCC May Suspend Payment of Forfeiture pursuant to 47 U.S.C. 503(b).

17. “In assessing forfeitures, the Commission is required to take into account **the nature, circumstances, and gravity of the violation(s); the violator’s degree of culpability; history of prior offenses, and ability to pay; and such other matters as justice may require.**” *In the Matter of San Jose Navigation, Inc., supra. (Emphasis Added.)* In *San Jose Navigation* the FCC rejected the applicant’s request to waive or reduce the forfeiture based on 47 U.S.C. 503(b). The FCC rejected this request because the applicant “consciously and deliberately marketed unauthorized devices, and thus its violations of the Act and rules were willful and properly subject to forfeiture penalty.” *Id.* Unlike *San Jose Navigation*, RSI did not consciously and deliberately take the actions erroneously cited by USAC in the Adjustment Letter and USAC Decision. Accordingly, the FCC may properly suspend the payment of any forfeiture by RSI at bar.
18. In the unlikely event, the FCC were to determine that RSI was in violation of applicable rules, it is respectfully requested that any forfeiture amount be substantially reduced in amount to reflect the intent of 47 U.S.C. 503(b).
- 18.1 The Nature and Circumstances of the alleged Violation(s) Do Not Support Imposition of Forfeiture.
- As discussed by the Commission in *In the Matter of Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., and School and Libraries Universal Service Support Mechanism*, “in many situations, the service provider simply is not in a position to ensure that all applicable statutory and regulatory requirement have been met. Indeed, in many instances, a service provider may be totally unaware of any violation.” *Id.* It is respectfully requested that the FCC take into consideration

RSI's status as a service provider and recognize that the draconian application of forfeiture would not only punish RSI for an action which was certainly not deliberate in nature, but also result in a forfeiture outcome inconsistent with the Commission's holding in *In the Matter of Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., and School and Libraries Universal Service Support Mechanism*. Accordingly, RSI would respectfully request that the Commission waive any forfeiture or, alternatively, substantially reduce the forfeiture amount recovered.

18.2 Lack of Culpable Conduct Does Not Support Imposition of Forfeiture.

Culpable is defined as "deserving blame". Oxford Dictionary (2012). Certainly, in other cases, this Commission has been presented with repeated overt fact patters where the offending party was (1) aware of the statutory or rule prohibition(s) and (2) violated the prohibition(s) notwithstanding prior knowledge of same. Such is not the case at bar. As set forth in the Affidavit of Mr. Miller, RSI was not aware of restrictions which would have precluded its position on the technology planning committee. Consequently, any potential violation was at best – inadvertent. It is submitted that in such circumstances, RSI is not "deserving of blame" as the requisite "degree of culpability" would not be present. Accordingly, RSI would respectfully request that the Commission waive any forfeiture or, alternatively, substantially reduce the forfeiture amount recovered.

18.3 Absence of Prior Offenses Does Not Support Imposition of Forfeiture.

The Commission may properly conclude that RSI has no history of violations with respect to any of its statutes or applicable law. See Affidavit of Stephen Miller. Accordingly, RSI would respectfully request that the Commission waive any forfeiture or, alternatively, substantially reduce the forfeiture amount recovered.

18.4 Inability of RSI to Pay Does Not Support Imposition of Forfeiture.

As set forth in the Affidavit of Mr. Miller, RSI does not have the financial ability to pay the forfeiture amount. That said, should the Commission require a further proffer of evidence or testimony to establish same, RSI would respectfully request an opportunity to present such supplemental evidence to the Commission, and that such information be sealed and not subject to public disclosure. See Affidavit of Stephen Miller.

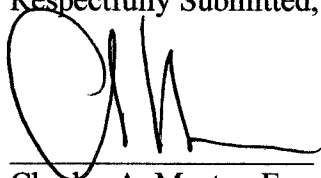
18.5 Interest of Justice Does Not Support Imposition of Forfeiture.

Finally, RSI would submit that the “interest of Justice” would dictate a waiver and/or substantial reduction of the forfeiture amount based on all of the arguments set forth above.

V. Conclusion.

19. For the reasons stated above, RSI respectfully requests that the FCC reverse USAC's denial as set forth in the USAC Decision, and affirm RSI's Letter of Appeal that it is not liable to USAC and/or the FCC with respect to the refund of funds disbursed for Funding Year 2005-2006.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'CM', with a horizontal line extending to the right.

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EXHIBIT - A

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

**In re Responsive Services International, Inc.; Appeal of USAC decision dated
5.10.12 for Funding Year 2005; Funding Request Number 1316125.**

AFFIDAVIT OF STEPHEN MILLER

STATE OF TEXAS

§

LUBBOCK COUNTY

§

§

BEFORE ME, the undersigned Notary Public, on this day personally appeared Stephen Miller known to me to be the person whose name is subscribed in the following instrument, and who, having been duly sworn, upon his oath deposes and states as follows:

1. “My name is Stephen Miller and I am over the age of 18 years and have never been convicted of a felony. I have personal knowledge of the matters set forth herein.”
2. “I am the Chief Executive Officer of Responsive Services International, Inc. (“RSI”) which is located at 1220 Broadway, 9th Floor; Lubbock, Texas 79401-3201.”
3. “RSI is listed as the service provider with respect to the aforesaid matter now pending before the Federal Communications Commission”.

4. "To the best of my knowledge, no inside information was obtained by RSI which resulted in any unfair advantage. Additionally, the OISD made its own determination as to the services sought by the applicant."
5. "I was totally unaware of any alleged violations of statutory and/or regulatory requirements by RSI until I was contacted by USAC."
6. "I was totally unaware of the existence of any statutory and/or regulatory requirements and/or rules of which RSI was alleged to have violated until RSI was contacted by USAC."
7. "RSI did not intend to violate, nor did RSI, any statutory or regulatory requirements as alleged by USAC."
8. "RSI has never been cited for any previous violation of the statutory and/or regulatory requirements imposed by USAC and/or the FCC."
9. "RSI does not have a present ability to refund USAC for the disbursed funds relating to funding year 2005."
10. "The refund to USAC of the disbursed funds would irreparably injure RSI's business operations."
11. "The public release and disclosure of information pertaining to RSI's finances would adversely affect business operations as competitors and clients would gain access to information which would otherwise be deemed confidential and proprietary."
12. Further, Affiant sayeth not."

Stephen Miller

SUBSCRIBED AND SWORN TO BEFORE ME, this _____ day of June, 2012.

Notary Public in and for
The State of Texas